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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

19547

FILE: B-201969

DATE: September 29, 1981

MATTER OF: Edwin G. Toomer

**DIGEST:**

1. Allegations of solicitation improprieties which were apparent from solicitation as issued are untimely when not filed until after closing date for receipt of initial proposals.
2. Agency could reasonably conclude that Service Contract Act does not apply to procurement the primary purpose of which is to secure use of seagoing vessel and incidental purpose is to secure services of captain and two crew members.
3. In procurement for use of seagoing vessel, evaluation of offeror's vessel from recollection of evaluation officials where officials were familiar with vessel from predecessor contract, rather than by physical inspection, is proper where protester does not allege improvement of vessel in interim between completion of contract and new procurement.
4. Award of technical evaluation points for equipment which was not installed on vessel at time proposal was submitted but is readily available to offeror is proper where firm unconditionally promises in proposal to install equipment.
5. Technical evaluation of offeror's research and fishing experience will not be reviewed by GAO absent showing of unreasonableness or inconsistency with established evaluation factors.

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6. Where agency does not find any technical deficiencies or weaknesses in proposal, call for best and final offers meets requirement for meaningful discussions.
7. Whether difference in point scores assigned to competing technical proposals indicates actual superiority of one proposal depends on facts and circumstances of each procurement, and is matter primarily for contracting agency's determination.

Edwin G. Toomer protests the award of a contract to John H. Miller under request for proposals (RFP) FSE43-81-123-23 issued by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce. Toomer objects to several RFP provisions, NOAA's failure to request Service Contract Act wage determinations from the Department of Labor to apply to the contract, and NOAA's evaluation of proposals. We conclude that the award was proper.

The RFP is for the charter of a vessel for marine investigations. NOAA received four proposals, three of which it found to be in the competitive range. After final technical evaluation, NOAA determined that the proposals of Miller and Toomer were technically superior to that submitted by the third offeror in the competitive range, and technically equal to each other. The RFP provides that when offers receive approximately equal technical ratings, award will be based on the lowest price offered. NOAA concluded that total price of Miller's proposal, including estimated reimbursement for fuel costs and per diem allowance for crew, was \$280,784, and the total price of Toomer's proposal was \$288,110. Therefore, NOAA awarded the contract to Miller.

#### ALLEGED RFP IMPROPRIETIES

Toomer alleges that several provisions of the RFP are improper. Toomer contends that the evaluation criteria set out by the RFP are vague and ill-defined and fail to adequately disclose the relative importance of certain evaluation categories. Toomer also argues that the RFP should not require that firms submit information relating to the cost of fuel, a reimbursable item. The protester further complains that certain RFP provisions conflict because they delegate to different NOAA personnel overlapping contract administration functions.

Each of these alleged improprieties was apparent from the face of the solicitation. Our Bid Protest Procedures, 4 C.F.R. Part 21 (1981), require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed before that date. 4 C.F.R. § 21.2(b)(1). The closing date for receipt of initial proposals was January 13, 1981. Toomer did not file a protest with our Office until January 29, 1981. Therefore, we find that these allegations were untimely filed, and they will not be considered.

#### SERVICE CONTRACT ACT

Toomer points out that although the RFP states that any resultant contract is subject to the Service Contract Act (SCA), 41 U.S.C. § 351 et seq. (1976), NOAA failed to submit to the Department of Labor (DOL) an "SF 98 - Notice of Intention to Make a Service Contract" as required by the Federal Procurement Regulations. The submission of an SF 98 provides DOL with the opportunity to render a wage determination for the services required by a solicitation. Toomer argues that the failure to submit the form precludes award to any offeror.

The record indicates, however, that NOAA did not intend to incorporate the SCA clause. The SCA applies to contracts "to furnish services \* \* \* through the use of service employees." 41 U.S.C. § 351. NOAA determined that the principal purpose of the contemplated contract is not to secure the services of service employees, but rather to secure the use of a vessel; the services of the few contractor personnel to be provided merely are incidental to the furnishing of a vessel. Therefore, NOAA did not submit an SF 98 to DOL.

DOL has the primary responsibility for administering and enforcing the SCA. B. B. Saxon Company, Inc., 57 Comp. Gen. 501 (1978), 78-1 CPD 410. The regulations promulgated by DOL envision that the initial determination as to whether the SCA may apply to a specific procurement will be made by the contracting agency. See 29 C.F.R. § 4.4 (1980); 53 Comp. Gen. 412 (1973). In reviewing these agency determinations, we will uphold the agency's position unless that position is unreasonable. 53 Comp. Gen. 412, supra; A&C Building and Industrial Maintenance Corporation, B-193047, April 13, 1979, 79-1 CPD 265. One way we consider the reasonableness of the agency's determination is to consider whether the agency reasonably should have believed that the procurement might be subject to the SCA. Thus, for example, where the record indicated that the Air Force had no reasonable basis for believing the SCA might apply to a particular procurement prior to the contract award, we did not object to the Air Force's failure to submit an SF 98. 53 Comp. Gen. 412, supra.

On the other hand, when the record indicated that the Air Force should have been aware of the SCA's possible applicability, we held that the Air Force was required to submit the SF 98 to DOL and to incorporate in the solicitation whatever wage determination DOL might find to be applicable. B. B. Saxon Company, Inc., supra; Hewes Engineering Company, Inc., B-179501, February 28, 1974, 74-1 CPD 112.

From the record before us, which shows only that NOAA inadvertently included the SCA clause in the RFP and that the technical evaluation encompassed captain and crew experience, we cannot conclude that the determination by NOAA that whatever services might be involved were incidental to the primary purpose of the contract was unreasonable. Consequently, we find no merit to this protest allegation.

### PROPOSAL EVALUATION

#### On-Site Inspection

The RFP requires all offerors to make their vessels available for inspection. NOAA did not physically inspect Toomer's vessel, but did conduct an on-site inspection of the vessels of the other two offerors in the competitive range. Contracting officials deemed such an inspection unnecessary because they had become familiar with Toomer's vessel during the negotiation and performance of the predecessor contract held by Toomer. Thus, the "inspection" of Toomer's vessel in effect was conducted by memory rather than by physical observation.

Toomer alleges that reliance on the recollections of Government personnel for inspection was improper. Toomer contends that he was prejudiced by the failure to physically inspect since his preliminary technical evaluation score of 51 was lowered after the inspection process to a final score of 49.

We do not believe that Toomer has demonstrated that NOAA's actions were improper or that he was prejudiced. The record shows that during the negotiation and performance of the previous contract the NOAA evaluators became very familiar with Toomer's vessel. Toomer does not allege that in the interim between the completion of the predecessor contract and the evaluation period he improved the condition or capabilities of the vessel or installed any equipment which would affirmatively affect the outcome of the technical evaluation. Nor does Toomer, after an opportunity to examine documents generated by NOAA during the course

of the technical evaluation, allege that the recollections of the contracting officials were inaccurate in any specific way.

The RFP does not promise each offeror an inspection as Toomer suggests. The RFP merely requires that each offeror make its vessel available if NOAA desired to inspect it. We know of no requirement that a procuring activity inspect facilities offered in response to an RFP. Rather, the procuring activity simply must treat all offerors fairly and equally. See Servo Corporation of America, B-193240, May 29, 1979, 79-1 CPD 380. Moreover, the fact that Toomer's final score was two points lower than the initial score does not, in itself, constitute a basis upon which to question the evaluation. The purpose of the initial evaluation is merely to determine which offerors are in the competitive range. The procuring activity is not bound to fix each offeror's score at that level. See Buffalo Organization for Social and Technological Innovation, Inc., B-196279, February 7, 1980, 80-1 CPD 107. We believe it was within NOAA's discretion to conclude, after further analysis and consideration, that a score of 49 points was a more accurate assessment of Toomer's proposal than was 51 points. We also point out that Miller's initial score was also reduced (by one point) and that despite these adjustments, Toomer remained the highest technically scored offeror. Under the circumstances, we cannot conclude that NOAA's inspection from recollection resulted in any unfairness or inequity.

#### Optional Equipment

The RFP specifies certain gear and equipment which each vessel must have in order to be considered for award. It also lists seven items of optional equipment for which a total of 24 technical evaluation points may be awarded. Miller received points for optional equipment which he did not have on the vessel at the time of submission of proposals, but which he promised to obtain and install. Toomer, however, submitted the proposal solely on the basis of optional equipment which already was on the vessel. Toomer contends that NOAA in effect amended the RFP by awarding points to Miller for the promised equipment.

Nothing in the RFP, however, requires offerors to have optional equipment installed at any time before contract performance. Since Miller offered to install the equipment, he became bound to do so upon the Government's acceptance of the offer. Thus, the award of points for equipment that Miller promised to install before beginning performance did

not constitute a relaxation or modification of the RFP requirement. NOAA states that the optional equipment promised was readily available to Miller and that contracting officials had no reason to believe that Miller was incapable of fulfilling his promise. We find that the award of optional equipment points was proper and consistent with the terms of the RFP.

#### Experience Ratings

The RFP allows 20 points for research and fishing experience of the captain and crew. Toomer points out that notwithstanding the experience it gained as the incumbent contractor, it received only three more points in the experience category than Miller did. Toomer complains that NOAA has not disclosed in its report on Toomer's protest the details concerning the evaluation of research and fishing experience.

It is not the function of our Office to evaluate the technical merits of proposals. Therefore, a contracting agency's technical evaluations will be questioned by our Office only upon a clear showing that they were unreasonable or inconsistent with the established evaluation factors. Group Operations, Inc., 55 Comp. Gen. 1315 (1976), 76-2 CPD 79.

Although Toomer disagrees with NOAA's assessment of the relative experience of the offerors, we find that NOAA acted reasonably and in accordance with the evaluation criteria. While the agency report does not address the experience evaluation other than to divulge the total points awarded each offeror and to indicate that Toomer possesses a slight advantage, we believe the evaluation is fully supported by information contained in the proposals. The RFP states that proposals will be evaluated on the basis of the captain's and crew's experience, including possession of a master's license, scientific research experience and fishing experience. The proposals indicate that neither captain possesses a master's license. Toomer's captain has eight years of fishing experience while Miller's has ten. Toomer's crew has three years of scientific experience and three years of fishing experience, while Miller's has, respectively, one and ten years of scientific and fishing experience. Given this information, we cannot conclude that the award of twelve points to Toomer and nine to Miller was unreasonable.

### Source Selection Board

Toomer contends that the Source Selection Board's actions violated NOAA Circular 71-54, which provides that Board members shall have equal status as rating officials, because only two of the four Board members officially recommended to the selection official that the contract be awarded to Miller.

The record shows, however, that three of the four members actually signed the recommendation memorandum. In any event, we do not agree that a recommendation signed by fewer than four members contravenes the cited provision of the circular. Moreover, we see nothing improper in a selection official acting on the recommendation of less than a full evaluation panel. See MAXIMUS, B-195806, April 15, 1981, 81-1 CPD 285.

### Discussions

Toomer contends that NOAA committed an impropriety by holding discussions with Miller concerning optional equipment, but not with Toomer. The record indicates that contracting officials contacted Miller to verify his offer to install optional equipment. It appears that NOAA sought verification of the offer to install optional equipment because it was made on a handwritten note attached to proposal forms. Toomer also submits that meaningful discussions should have been held with respect to vessel capabilities and experience.

In negotiated procurements, discussions generally are required to be conducted with the offerors in the competitive range. Federal Procurement Regulations § 1-3.805-1a (1964 ed.). The discussions must be meaningful and furnish information to those offerors about the areas in which their proposals are considered to be deficient so that they have full opportunity to satisfy the Government's requirement. 47 Comp. Gen. 336 (1967). Moreover, once discussions are held with one offeror in the competitive range they must be held with the others as well.

The content and extent of discussions needed to satisfy the requirement for meaningful negotiations with a particular offeror, however, is a matter primarily for the contracting agency's determination, which we will not disturb unless clearly unreasonable. Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 CPD 61. Where the agency decides that there are no technical deficiencies in a proposal, a call for best and final offers, which gives the offeror the chance to revise the proposal in any way desired, in itself

may be sufficient to fulfill the requirement for meaningful discussions. Decision Sciences Corporation, B-196100, May 23, 1980, 80-1 CPD 357.

The record shows that NOAA did not find Toomer's proposal deficient with respect to optional equipment, so that there was nothing for NOAA to discuss with Toomer on that matter. NOAA also did not find Toomer's proposal deficient as to vessel capabilities and experience. Under the principles stated above, therefore, NOAA's request for best and final offers was sufficient to constitute meaningful discussions with the firm. Decision Sciences Corporation, supra.

#### Cost As Determinative Factor

The RFP provides that cost will be an important consideration and that where proposals receive approximately equal ratings, award will be made to the offeror submitting the lowest price. According to the RFP, a significantly higher-rated proposal with a higher price may be selected over a lower-rated, lower price one where "the technical margin exceeds the price differential."

Toomer received 49 out of a possible 69 points; Miller received 47. NOAA determined that the proposals were technically equal and awarded to Miller on the basis of price. Toomer complains that NOAA has failed to supply a detailed factual explanation of why the point differential between Toomer and Miller was deemed insubstantial. Toomer contends that such an explanation especially is important since only \$7,326, or two percent of Miller's price, separate the proposals.

We consistently have held that although technical point ratings are useful as guides for intelligent decision-making in the procurement process, the determination of whether a particular point spread between two proposals indicates the actual superiority of one proposal depends upon the facts and circumstances of each procurement, and is a matter primarily within the discretion of the procuring agency. See Tracor Jitco Inc., 54 Comp. Gen. 896 (1975), 75-1 CPD 253; 52 Comp. Gen. 686, 690 (1973). The record affords us no basis upon which to conclude that the agency has exercised this discretion unreasonably in finding the proposals to be technically equal. The RFP specifically provides that where offerors receive approximately equal ratings award will be made on the basis of cost. Hence, award to Miller on the basis of a \$7,326



proposed cost advantage was proper. We also point out that, as will be discussed below, when those costs were analyzed, NOAA found that the savings to the Government if it accepted Miller's offer actually was over \$18,000.

### Cost Evaluation

The RFP contemplates 300 sea days of service divided, for budgetary reasons, into a base period and option period. Offerors were to submit separate fixed prices on a per sea day basis for each period. The cover letter to the solicitation states that the two periods will be for between 130 and 170 sea days, with the exact number to be agreed upon at the time of award. Additionally, the RFP provides:

"A. Initial Award. The initial period of performance is for \_\_\_\_\_ (130 to 170 as negotiated) sea days \* \* \*.

"B. Option Period. The Government may renew this contract at the price set forth in the schedule for an additional \_\_\_\_\_ (130 to 170, as negotiated) sea days, for a total of 300 sea days \* \* \*."

NOAA evaluated the proposals on the basis of 150 day initial and option periods. Toomer contends that because the terms of the RFP require NOAA to negotiate the number of days in each period with the successful offeror, NOAA's evaluation did not reflect the actual cost to the Government of contracting with each firm.

We do not see how Toomer was prejudiced in this regard. Toomer circled the numbers 170 and 130 respectively for the initial and option periods, and submitted a fixed price of \$825 per sea day for the initial period and \$830 per sea day for the option period. Miller did not indicate a number of days, but submitted a price of \$775 per sea day for each period. On the basis of 150-day periods for each firm, NOAA determined that Miller's total fixed price for the two periods (300 days x \$775 per day = \$232,500) was \$18,750 lower than Toomer's (150 days x \$825 per day plus 150 days x \$850 per day = \$251,250). Based upon the numbers of days that Toomer indicated, which is the most advantageous combination that he could have negotiated, Miller's price would still be \$18,250 lower than Toomer's (170 days x \$825 per day plus 130 days x \$850 per day = \$250,750). Thus, the evaluation based on 150 days as opposed to the evaluation suggested by Toomer does not

alter the fact that Miller offered a lower cost over 300 days, and Toomer therefore was not prejudiced by the evaluation. See Umpqua Research Company, B-199014, April 3, 1981, 81-1 CPD 254.

### Best Buy Analysis

Toomer also alleges that NOAA failed to perform a proper "best buy analysis" as required by the solicitation. The RFP provides that:

"\* \* \* A best buy analysis will be conducted, weighing both technical and cost values. Award will be made on the basis of the greatest overall benefit to the Government, cost and other factors considered."

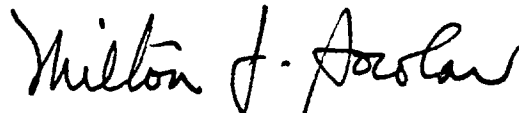
Toomer contends that NOAA improperly failed to consider the savings in fuel, a reimbursable cost item, which the Government would obtain as a result of Toomer's superior vessel range and fuel efficiency.

The record clearly indicates, however, that procuring officials did consider the projected cost of fuel for which the Government would have to reimburse each offeror. The RFP requires offerors to submit an estimate for fuel costs. Toomer estimated these costs at \$33,560 and Miller estimated \$44,984. The Source Selection Board in the memorandum submitted to the selection official set the total proposed cost of Toomer's and Miller's offers at \$288,110 and \$280,784, respectively. These figures included the fuel estimates submitted by both offerors.

The Board, however, also analyzed the offerors' estimated fuel costs. This was consistent with our holding that a low cost estimate proposed by an offeror should not be accepted at face value and that an agency should make an independent cost projection of the estimated costs submitted in the proposal to assure the realism of the proposed costs. University Research Corporation, B-196246, January 28, 1981, 81-1 CPD 50. Based upon hull and engine characteristics of the two vessels and its experience with Toomer's vessel under the previous contract, NOAA determined that there would be no significant difference in fuel costs for the two vessels. NOAA therefore concluded that the lower fuel costs estimated by Toomer would not be realized, and thus that the more than \$18,000 difference in cost to the Government represented by Miller's proposal without considering fuel costs would be realized.

Toomer also submits that the "best buy analysis" clause requires NOAA to take into account the cost of removing its equipment from Toomer's vessel and installing it on the awardee's vessel even though this cost is not set forth as a cost evaluation factor in the RFP. We disagree. If a procuring activity considers it financially advantageous to maintain an incumbent contractor, a specific dollar amount must be spelled out in the solicitation so that competitors will be informed of the financial value to the Government of not changing contractors. 50 Comp. Gen. 637 (1971). In any event, the transition costs, which NOAA estimated to be \$2,374, even if added to Miller's price, would not affect the relative standing of the proposals.

The protest is denied.

A handwritten signature in dark ink, reading "Milton J. Arosan". The signature is written in a cursive, flowing style.

Acting Comptroller General  
of the United States